UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FEB 10 1967

THE LAHAINA-MAUI CORPORATION,
a California corporation,

Appellant,

v.

JOSEPH TAU TET HEW and HELEN
AKIONA HEW, husband and wife,
GEORGE TAN and SHIZUKO RUTH
TAN, husband and wife,

Appellees.

No. 20419

FILED

NOV 1 [illegible]

FRANK H. SCHMID, CLERK

BRIEF FOR THE LAHAINA-MAUI CORPORATION, APPELLANT

Appeal from Summary Judgment granted by the United States
District Court for the District of Hawaii

MOORE, SILBERMAN & SCHULZE
Suite 1220, Ala Moana Bldg.
1441 Kapiolani Boulevard
Honolulu 14, Hawaii

Of Counsel

RICHARD P. SCHULZE, JR.
Suite 1220, Ala Moana Bldg.
1441 Kapiolani Boulevard
Honolulu, Hawaii 96814

Attorney for Appellant

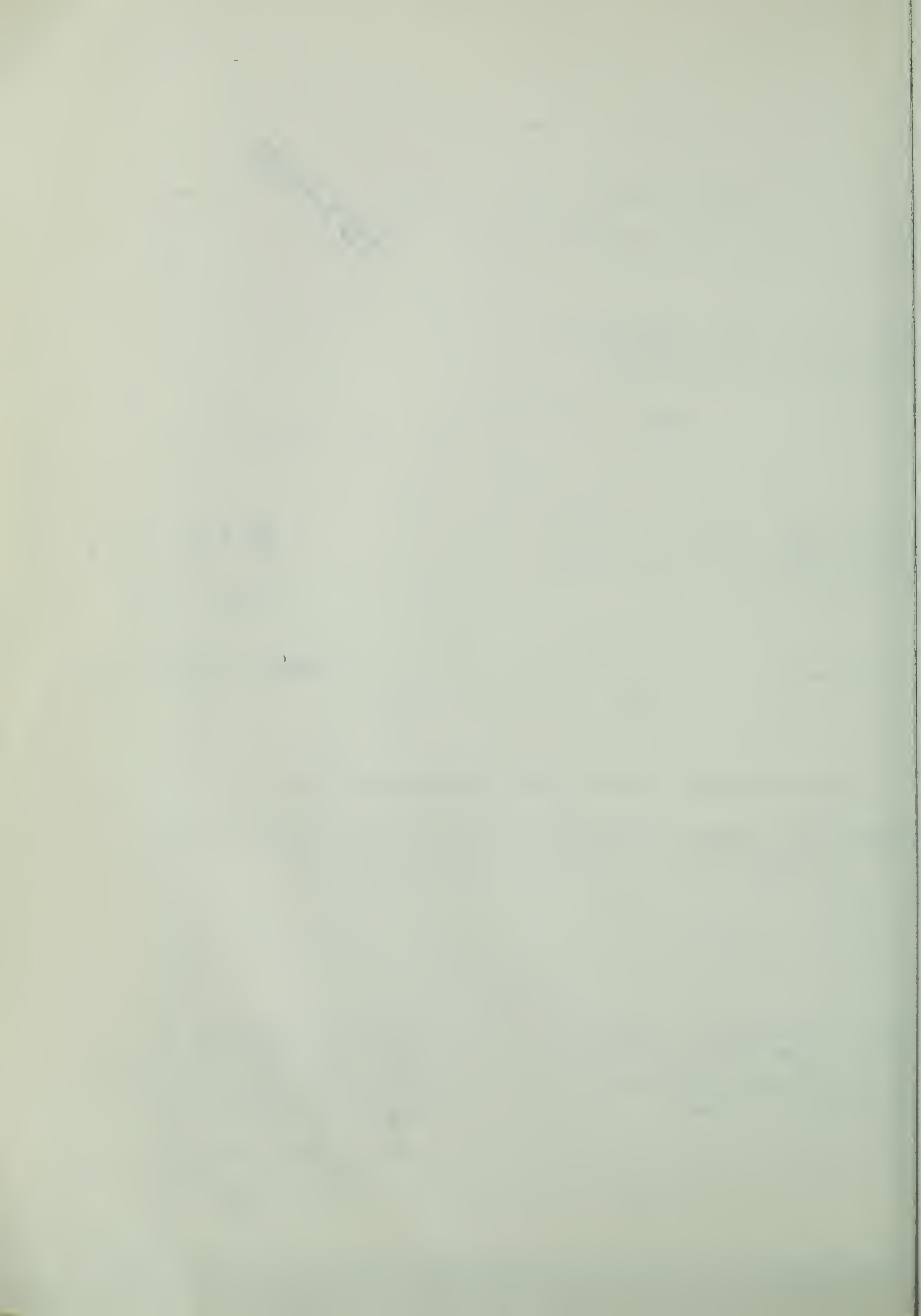


TABLE OF CONTENTS

	Page
Jurisdictional Statement..........................	1
Statement of Facts................................	3
Specification of Errors...........................	7
Summary of Argument...............................	9
Argument:	
I. The Subordination Clause is not Indefinite and is Specifically Enforceable............	11
II. Appellant's Waiver of Benefits Under the Subordination Clause was Proper and Rendered the Contract to Lease Specifically Enforceable................................	18
III. The Contract to Lease was Sufficiently Definite to Sustain Appellant's Claim for Damages................................	32
IV. The Court Improperly Cancelled Appellant's Lis Pendens................................	35
Conclusion................................	37

INDEX OF CITATIONS

Cases: Page

Applefield v. Fidelity Federal Savings & Loan Association of Tampa, 137 S.2d 259 (Ct. App. Fla. 1962) 12

Blanton v. Williams, 209 Ga. 16, 70 S.E.2d 461 (1952) 21, 23, 29

Brooklyn Trust Co. v. Fairfield Gardens, 206 N.Y. 16, 182 N.E. 231 (1932) 12

Brown v. Carter, 15 Haw. 333 (1903) 16

Burbank v. Wood, 2 Haw. 591 (1862) 16

Darst v. Bates, 95 Ill. 493 (1880) 12

Eppstein v. Cuhn, 225 Ill. 115, 80 N.E. 80 (1906) 20

Erie R. Co. v. Tompkins, 304 U.S. 64, 82 L.Ed. 188 (1938) 36

F. S. Royster Guano v. Hall, 68 Fed. 533 (4th Cir. 1934) 30

Francone v. McClay, 41 Haw. 72 (1955) 5, 13, 14

Gould v. Callan, 127 Cal. App. 2d 1, 273 P.2d 93 (1954) 16

Haire v. Patterson, 63 Wash. 2d 282, 386 P.2d 953 (1963) 23

Hubbell v. Ward, 40 Wash. 2d 779, 246 P.2d 468 (1952) 18, 22, 29

Jasper v. Wilson, 14 N.Mex. 482, 94 Pac. 951 (1908) 24

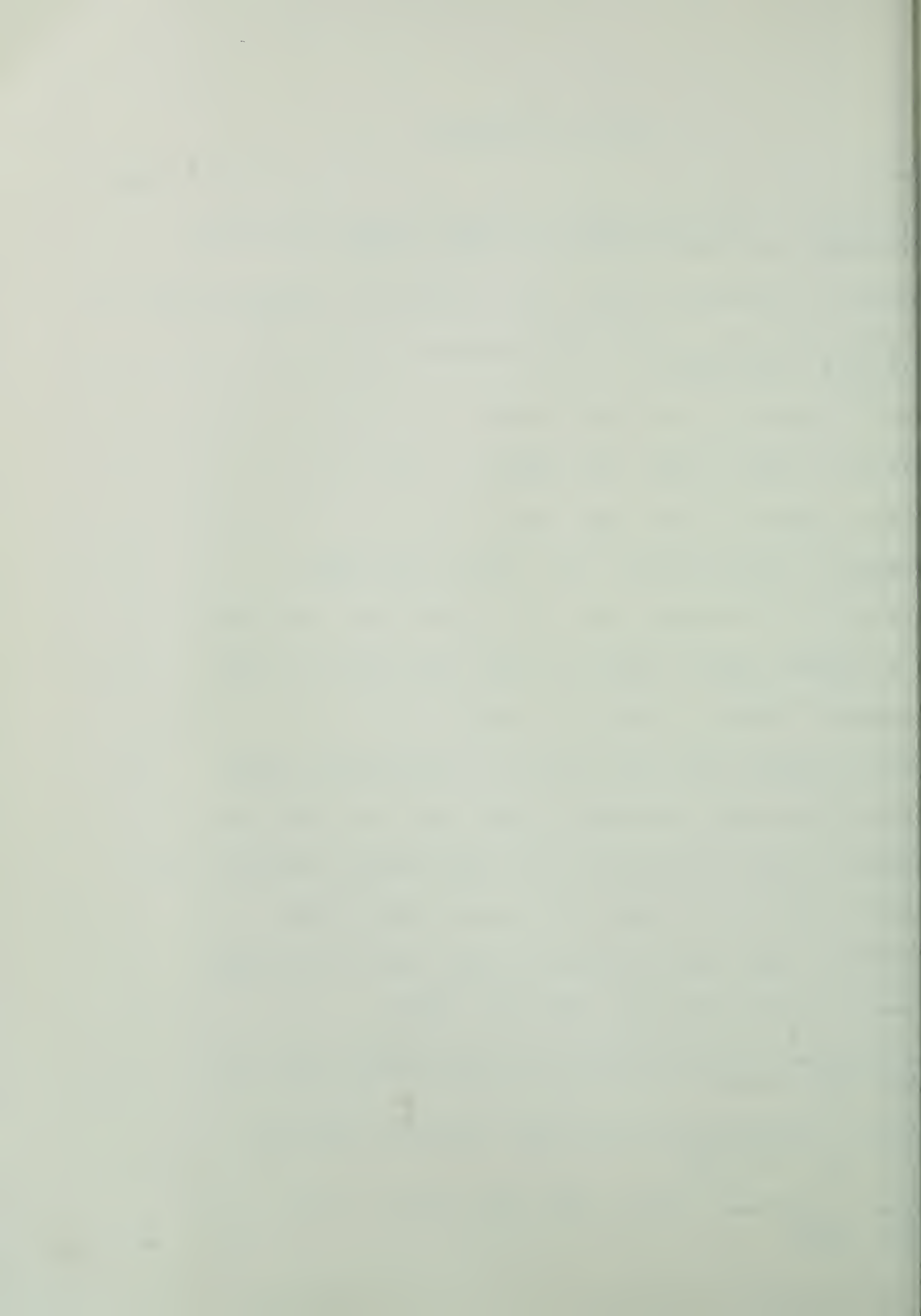
Kessler v. Sapp, 169 Cal. App. 2d 818, 338 P.2d 34 (1959) 16

Kremer v. Schutz, 107 Pac. 780 (Kan. 1910) 36

Lee Wah Koon v. Maui Dry Goods and Grocery Co., Ltd., 30 Haw. 313 (1928) 20

Levine v. LaFayette Building Corp., 103 N.J. Eq. 121, 142 Atl. 441 (1928) 20, 23

Lorder v. Perlman, 129 App. Div. 93, 113 N.Y. Supp. 420 (1908) 12



:ases: Page

:aedel v. Wies, 15N.W. 2d 692 (Mich. 1944) 36

:arpret Corp. v. Hargust Corp. 210 N.Y. Supp. 465 (1925) 36

:cCarty v. Harris, 216 Ala. 265, 113 So. 233 (1927) 17

:oran v. Midland Farms Co., 282 S.W. 608 (Tex. 1926) 36

orris v. Ballard, 56 App. D.C. 383, 16 F.2d 175 (1926) 23, 30

'eely v. Broadstreet National Bank of Redbank, 16 F. Supp. 839 (D.N.J. 1936) 24

rilik v. Goodman, 111 N.Y.S. 2d 916 (S.Ct. 1952) 23

'orelle v. Templeman, 94 Mont. 149, 21 P.2d 60 (1933) 20

'rotter v. Lewis, 185 Md. 528, 45 A.2d 329 (1946) 22, 23, 29

ilkin v. Shell Oil Co., 197 F.2d 42 (1952) 36

odehouse v. Hawaiian Trust Co., 32 Haw. 835 (1933) 15, 16

right v. Fred Heyden Industries, 6 Cal. Rptr. 392 (Ct. App. 1959) 16

'right v. Houdaille Hershey Corp., 321 Mich. 21,31 N.W. 2d 85 (1948) 24

'ork Mortgage Co. v. Clotar Construction Co., 254 N.Y. 128, 172 N.E. 265 (1930) 12

'reatises, Texts & Periodicals Page

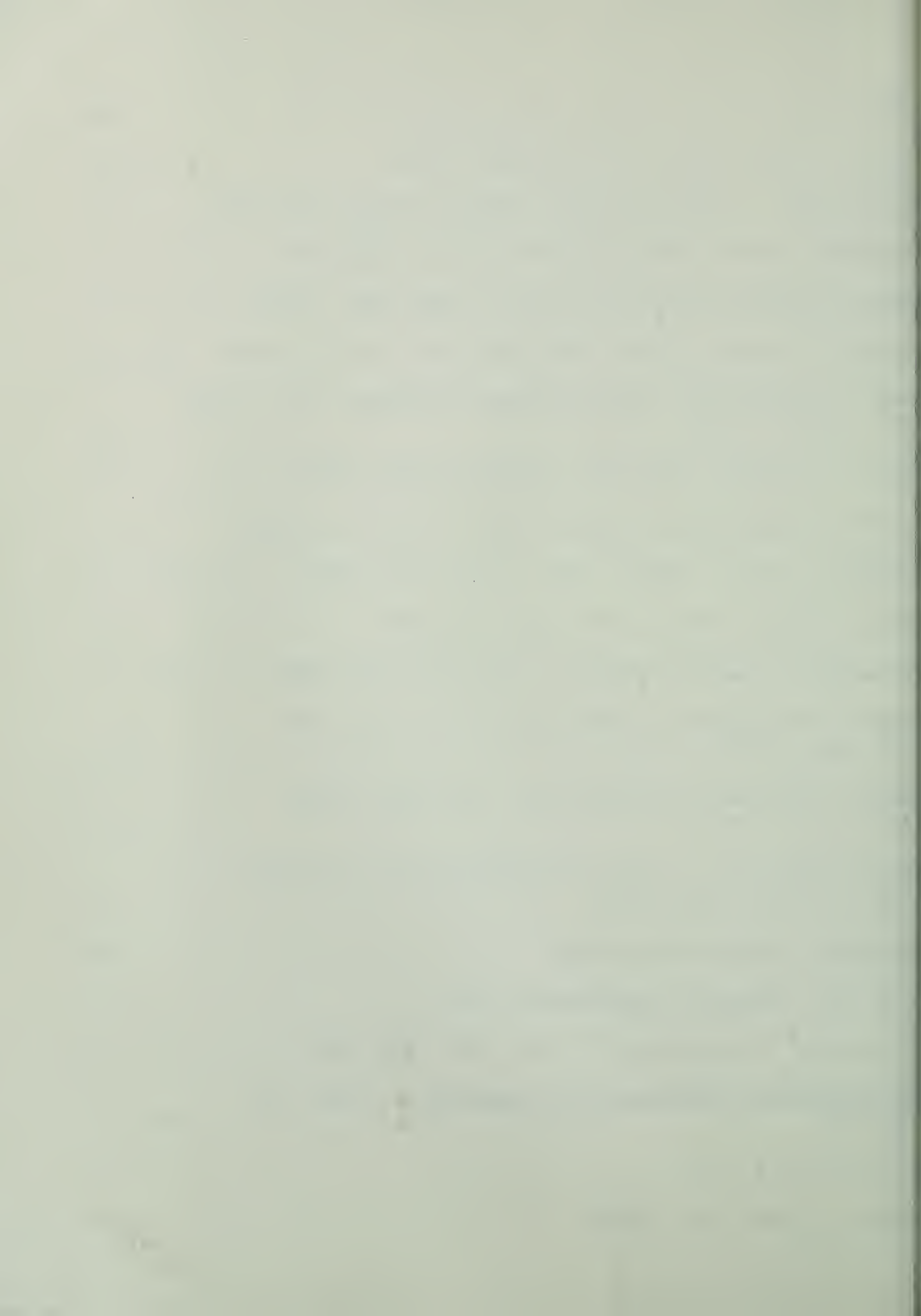
.9 Am. Jur. Specific Performance, §77 19

.7 Am. Jur. 2d Contracts §§ 75-85, 244, 254, 390 30, 33

'ry on Specific Performance of Contracts §§ 355, 361 and 966 19, 30

.0 L.R.A. (N.S.) 117 20

:3 Mich. L. Rev. 535 (1925) 20



reatises, Texts & Periodicals — Page

Pomeroy's Equity Jurisprudence (5th Ed. 1941) §1405b — 19, 30

omeroy Specific Performance of Contracts §§ 155 and 361, (3d Ed. 1926) — 30, 32

estatement, Contracts §365 — 18

tatutes & Rules — Page

alifornia Civil Procedure Code 580b — 16

ed. Rules of Civil Procedure 56(c) — 13

evised Laws of Hawaii (1955) Sec. 230-42 — 35

3 USCA §§ 1332 and 1441 — 2

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

THE LAHAINA-MAUI CORPORATION,
a California corporation,

Appellant,

v.

JOSEPH TAU TET HEW and HELEN AKIONA HEW, husband and wife, GEORGE TAN and SHIZUKO RUTH TAN, husband and wife,

Appellees.

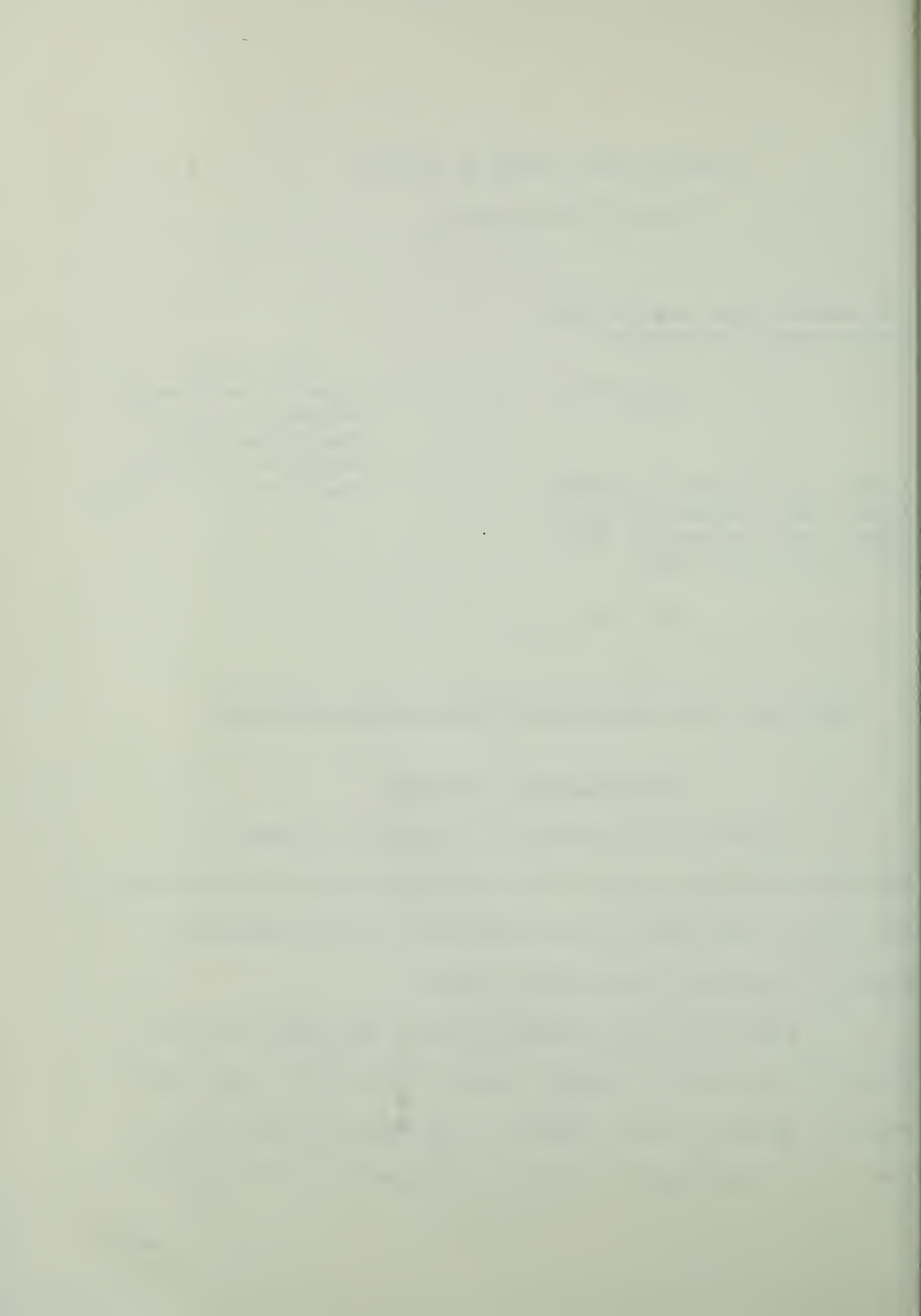
No. 20419
Appeal from Summary Judgment granted by the United States District Court for the District of Hawaii

BRIEF FOR THE LAHAINA-MAUI CORPORATION, APPELLANT

JURISDICTIONAL STATEMENT

Plaintiffs-Appellees are citizens of Hawaii. Defendant-Appellant corporation was organized and exists under the laws of the State of California and has its principal place of business in California (R.41-2).

This is a controversy of which the United States District Courts have original jurisdiction in that the controversy is wholly between citizens of different States and the amount in controversy, exclusive of interest and costs, exceeds



$10,000.00, pursuant to Section 1332 of the Judicial Code, 28 USCA 1335.

The U. S. District Court for the State of Hawaii after granting a Petition for Removal (R.41-2) pursuant to Section 1441 of the Judicial Code, 28 USCA 1441, entered Summary Judgment granting relief prayed for by the Plaintiffs-Appellees and denying relief prayed for by Defendant-Appellant.

Notice of Appeal from that Judgment to this Honorable Court was filed on the 30th day of June 1965 (R 123).

STATEMENT OF FACTS

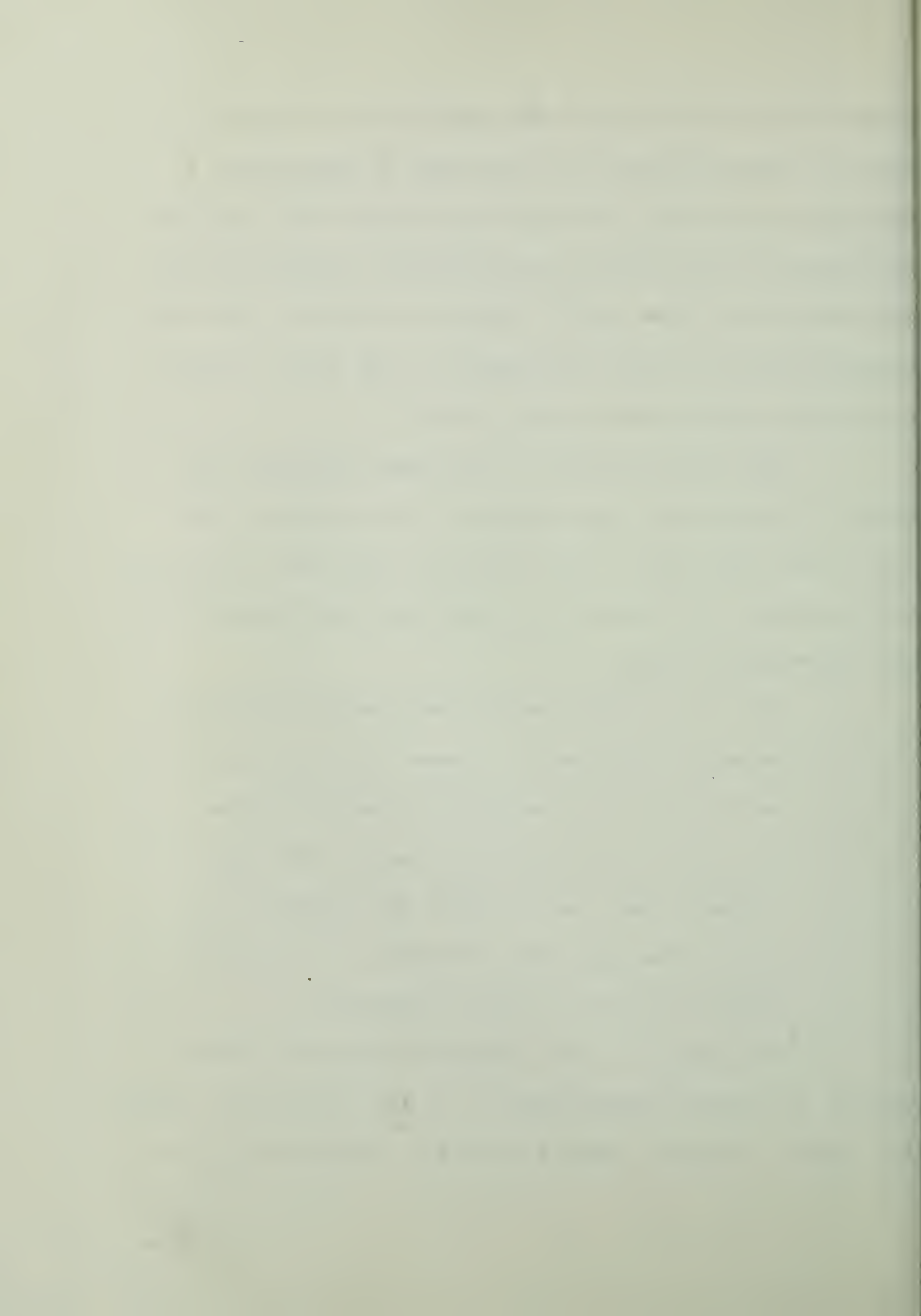
On or about February 15, 1963, Appellant's predecessors in interest completed negotiations with Plaintiffs-Appellees for the lease from Appellees of certain unimproved land in the town of Lahaina, Island and County of Maui, State of Hawaii. On February 15, 1963, an option to lease such property was executed by Appellees and delivered to Defendant-Appellant's predecessors in interest in return for a consideration of $1,000.00 paid by Defendant's predecessors in interest. The option and an extension thereof are Exhibits A and B respectively to Plaintiffs' complaint (Record pp 8-12). On July 26, 1963, the option was assigned to Appellant and on this same date Appellant and its predecessors in interest unconditionally exercised the option by signing and delivering to Appellees a "Notice of Exercise of Option to Lease" (Record p 102). On August 23, 1963, Appellees formally declined to execute a lease. On August 29, 1963, they filed a complaint in the Circuit Court of the Second Circuit, State of Hawaii alleging that the option to lease constituted a cloud upon their title and asking for cancellation of the said option. On September 11, 1963, Appellant removed the cause to the

United States District Court for the District of Hawaii and filed an answer denying the allegations of Plaintiffs. Defendants also filed a counterclaim praying that Appellees be required to specifically perform their obligations under the contract to lease and for damages in addition; the said counterclaim also prayed for damages in the event a decree of specific performance was not granted.

The option executed by Appellees contained the names of the parties, a description of the premises, the term of the lease and of the option and the rental to be paid. Other matters to be included in the lease were disposed of by the following provision:

> Said lease shall contain the standard provisions normally contained in a lease for similar property situate in the State of Hawaii together with the provision that the Lessor shall subordinate their fee to permit the Lessee to obtain financing which provision is by way of example, but not by way of limitation.

On January 5, 1965, Plaintiffs-Appellees filed a "Motion to Dismiss Counterclaim or, in the Alternative, Motion for Summary Judgment" (Record pp 99-101) essentially on the



ground that the above provision was vague and indefinite and thus not specifically enforceable. After hearing on the motion the court below ruled orally on January 7, 1965, that in all respects save one the option to lease was governed by Francone v. McClay, 41 Haw. 72 (1955) and was thus specifically enforceable (Record pp 104-109). The offending provision, according to the court, was the latter portion of the clause quoted above; i.e.:

> . . . together with the provision that the Lessor shall subordinate their fee to permit the Lessee to obtain financing . . . .

The court found this provision uncertain notwithstanding defendant's offer in open court to provide expert testimony to the effect that it was clear and complete and that a subordination clause could be drawn from it without further negotiation or clarification (Record 112, 113).

Appellant, however, offered in open court to waive all benefit under the offending provision in order to obtain a decree of specific performance and judgment was withheld pending submission of briefs and oral argument by the parties on the effect of this waiver. On June 14, 1965, the court below granted Appellees' motion for summary judgment (Record

p 114-118) finding essentially that the clause quoted above was "so vague, indefinite and uncertain" that the entire option could not be specifically enforced. As to Appellant's waiver of the provision, it was held ineffective on the ground that the subordination clause was for the benefit of both parties, not the Appellant alone. No mention was made in the court's ruling of Appellant's prayer for damages in the event specific performance was not to be granted. The court also, in its order, cancelled the lis pendens previously recorded by Appellant in the Bureau of Conveyances of the State of Hawaii (Record p 119-121).

SPECIFICATION OF ERRORS

1) The court could not properly find on a motion for summary judgment that the subordination clause was too indefinite for specific performance, particularly in light of Appellant's offer in open court to provide testimony and evidence to the contrary.

2) In any case, the court erred in finding as a matter of law that the subordination clause pertinent to this case was so indefinite as to render the option incapable of specific performance.

3) Even assuming the court properly found the subordination clause to be unenforceable, the court should have refused to grant summary judgment since the proper remedy in such case would be to grant specific performance conditioned upon Appellant foregoing the benefits it was to receive under the unenforceable clause.

4) Even assuming the court would not be required to grant the remedy described above, the court committed error in refusing to accept Appellant's waiver of the benefits accruing to it in the subordination clause thereby rendering the option specifically enforceable.

5) Even assuming results unfavorable to Appellant in all the above specifications, the court committed error in granting Summary Judgment since even if the contract between Appellees and Appellant was too indefinite for specific performance, it could still be the object of a damage action.

6) The court erred as a matter of law in cancelling Appellant's lis pendens.

SUMMARY OF ARGUMENT

The District Court erred in ruling that the subordination clause was indefinite and not capable of specific enforcement because the clause, on its face, is clear, complete and definite. Even if the court had doubts as to its definiteness, it should not have granted a summary judgment, but rather should have heard the expert witnesses proffered by appellant, the use of which in a case of this kind is accepted procedure under Hawaii law. In any event, the court should have accepted appellant's offer to waive the benefits to which it was entitled under the subordination clause and should have ruled that this waiver cured the contract of any indefiniteness and thus of any bar to specific enforceability. Such waiver is a common procedure where it is not possible to enforce a part of the performance required of the other party and the waiving party is willing to forego the benefit of such performance in order to obtain specific performance of the remainder.

But even if the court were correct in ruling summarily that specific enforcement of the contract could not be granted, it failed to understand that a substantially lesser degree of definiteness is required of contracts which are the subject of an action for damages than is required by equity for specific enforcement. The contract in this case quite clearly will sustain

an action for damages, yet the court granted summary judgment to appellees even over appellant's claim for damages in lieu of specific performance if the latter were not granted.

Finally, the court erred in cancelling appellant's lis pendens since it did so without a shred of evidence giving it justification for such an action and since such an action was beyond the court's power.

ARGUMENT

I. The Subordination Clause:

Subordination agreements most frequently arise in the context of a purchase of unimproved real property when part of the payment is deferred and secured by a purchase money mortgage. This mortgage will have priority over any subsequent mortgage taken out by the purchaser, but, in many transactions, the purchaser obtains the seller's consent -- usually as part of the terms of sale -- to permit such a subsequent mortgage to assume priority. Where the transaction involves a lease rather than a purchase, the agreement to subordinate is made by the Lessor who agrees to permit the Lessee to subject his fee simple interest to a mortgage. The latter situation involves, in effect, the grant to the Lessee of a special interest in the fee -- an interest permitting the Lessee to encumber the fee, but nothing more. Whether as part of a lease or of a sale, the sole purpose and function of a subordination agreement is to assist the Lessee or purchaser in obtaining financing; such agreements constitute a common and important device in the financing of improvements to realty in many areas of the country.

As may be seen, an unrestricted agreement by a lessor to subordinate his fee simple interest to a mortgage presents a

potential hazard for the Lessor in this respect: where the Lessee would normally have had to invest a certain portion of his own funds to finance improvements, he might now be able to utilize the value of the fee simple interest for borrowing purposes, thus reducing or even eliminating the need for his own funds. In such a case, the encumbrance upon the improvements might approximate or equal their value, thus reducing the Lessor's "insurance" -- or security -- in the event of a breach of the lease necessitating its cancellation and the taking over of the improvements by Lessee. The same hazard exists, of course, to a seller. Notwithstanding the risk, many subordination clauses are drawn, like the one in this case, without restrictions of any kind upon the mortgage to which subordination will be allowed.[1] Others contain restrictions for the protection of the seller or Lessor, often limiting the use of funds borrowed under such mortgages to financing improvements[2] and/or restricting the amount of the mortgage to a specified percentage of the value of the improvements.[3]

1/ See, <u>Applefield v. Fidelity Federal Savings and Loan Association of Tampa</u>, 137 S. 2d.259 (Ct. App. Fla. 1962)

2/ See, <u>e.g.</u>, <u>York Mortgage Co. v. Clotar Construction Corp.</u>, 254 N.Y. 128, 172 N.E. 265 (1930); <u>Lorder v. Perlmar</u>, 129 App. Div. 93, 113 N.Y. Supp. 420 (1908).

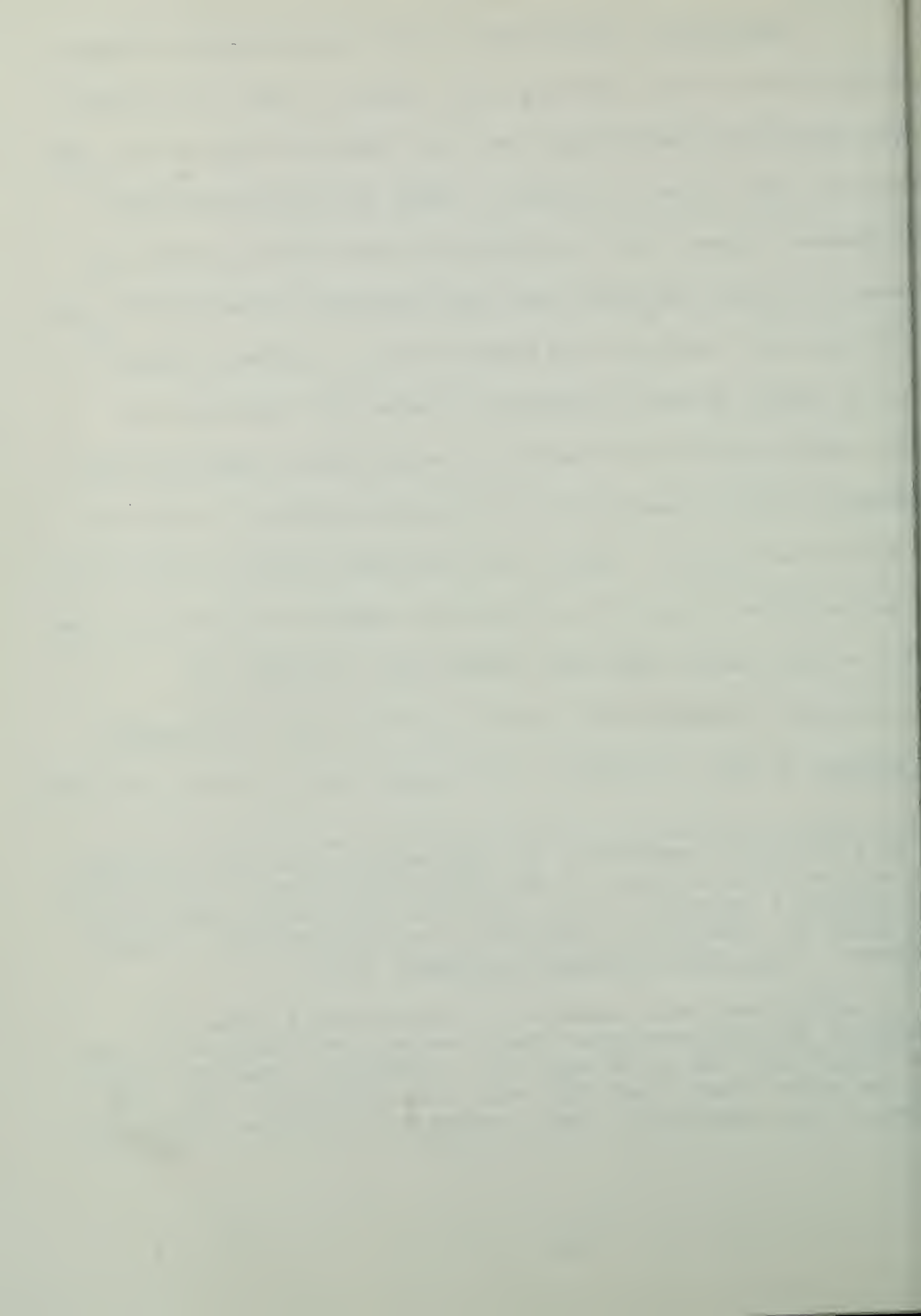
3/ See, <u>e.g</u>. <u>Darst v. Bates</u>, 95 Ill. 493 (1880). See also, <u>Brooklyn Trust Co. v. Fairfield Gardens</u>, 260 N.Y. 16, 182 N.E. 231 (1932) (Subordination limited to a particular mortgage).

Essentially, Plaintiffs' claim respecting the alleged indefiniteness of the subordination clause is that it is incomplete because no restrictions were set forth in the option. The answer to this claim is obvious: there are no restrictions.[4/] The phrase, "Lessor shall subordinate their fee to permit the Lessee to obtain financing" may lack something grammatically but it is as clear, definite and unequivocal as a phrase can be.[5/] It is a simple matter to prepare a clause for insertion in a lease reflecting the agreement of the parties as shown by this provision with no possibility of misunderstanding or distortion of the stated intent. Indeed, the Defendant stated in open court on two occasions that it would provide experts to testify at the trial of this matter that the clause had a definite and ascertainable meaning as it stood. (pp 112, 113) In Francone v. McClay, 41 Haw. 72 (1955), the Supreme Court of Hawaii affirmed

---

4/ If Plaintiffs' contention is that restrictions were intended but were somehow left out of the written agreement, the Plaintffs are raising a question of fact which is disputed by the answer and which is, therefore, incapable of adjudication by a Summary Judgment. Fed. Rules of Civil Procedure 56(c).

5/ It might have been possible to manufacture a claim of ambiguity on the ground that there was no specification of what the "financing" was to be used for. Defendant, however, admits and has never denied that this word was intended to, and does, refer to the financing of improvements on the subject property.



decree of specific performance of a contract to lease almost recisely like ours as against a claim that it was indefinite. he testimony of Mr. Howard Moore, "a member of the Bar and an xpert in realty transactions," was accepted by the trial court nd apparently relied upon by the Supreme Court in holding that s to long term leases, a contract containing a provision that he lease shall contain "all other usual covenants" was ufficiently definite to be specifically enforceable. Appellant ffered the testimony of the same expert to the same effect as is testimony in that case; i.e., that the challenged sub-rdination clause is sufficiently clear and definite to be ranslated into a formal and complete lease clause without any urther information being necessary. (Record pp. 112, 113). he Francone case establishes that, under Hawaii law (which overns this case), the definiteness and thus enforceability f lease provisions is a question of fact, or at least a uestion upon which the testimony of experts in the community is elevant. The court below thus should not have granted a ummary judgment on the question, particularly when the only roffered testimony was directly contrary to the court's ruling.

The District Court ruled here, in essence, that an greement to subordinate is not complete unless there are re-trictions upon same and unless they are spelled out. In short, n owner of property cannot enter into an agreement to subordinate

less he also negotiates <u>and</u> <u>obtains</u> conditions upon such agree-
nt which are protective to him and restrictive upon the other
rty. The absurdity of such a rule becomes apparent when a
bordination agreement is viewed in its proper perspective
th other security devices. In most states, and in Hawaii, a
ller of land taking less than the full purchase price in cash
uld receive a promissory note for which the purchaser was
rsonally liable[6/] as well as the added security of a mortgage
the property. It is clear that a seller of land in such a
ate could, if he wished, omit the mortgage entirely and accept
promissory note for the unpaid balance of the purchase price,
ereby relying directly on the seller's personal credit with-
t any further security; equally the seller could insist on
curity in the form of a mortgage on the land and of all future
provements, as well as all other real and personal belongings
the buyer. In short, the seller could accept anything in a
nge from no security at all to an almost infinite amount of
curity. Whether he wants security at all and, if so, how much,
e clearly matters left to be decided between him and his purchaser
the absence of fraud the courts never have been

/ <u>Wodehouse v. Hawaiian Trust Co.,</u> 32 Haw. 835 (1933)

willing to interfere.[7] There is no difference except in degree between, 1) a seller relying solely on the purchaser's personal credit and having no mortgage at all as security, 2) a seller having as security a purchase money mortgage which he has agreed to subordinate to whatever other mortgage the purchaser may place on the property, 3) a seller having as security a purchase money mortgage which he is willing to subordinate only within prescribed limitations, and 4) a seller having a purchase money mortgage which he is not willing to subordinate at all. All are simply degrees of security and are for the determination of buyer and seller, not a court.[8]

7/ CF Brown v. Carter, 15 Haw. 333 (1903); Burbank v. Wood, 2 Haw. 591 (1862) ("Whether it was a wise and judicious contract is not for the court to say."); Wodehouse op. cit. at 843 ("courts of equity do not thus come to the assistance of persons of legal age and of sound mind in a transaction free from mistake and fraud who have merely committed an error of judgment").

8/ In California, however, an entirely different situation prevails, for by statute the purchaser of property has no personal liability under a purchase money mortgage. California Civil Procedure Code §580(b). This may help explain the existence of a couple of cases from the intermediate appellate courts of that state holding that an unrestricted agreement to subordinate by sellers taking purchase money mortgages is unenforceable. Kessler v. Sapp, 169 Cal., App. 2d. 818, 338 P2d. 34 (1959); Wright v. Fred Meyers Industries, 6 Cal. Rptr. 392 (Ct. App. 1959). Neither of these cases gives any reasoning or explanation of its action; both rely heavily on equally unreasoned obiter dictum in Gould v. Callan, 127 Cal. App. 2d.1, 273 P.2d. 93 (1954) which they incorrectly refer to as the "holding" of that case.

The one case which Appellant has been able to find from a comparable jurisdiction which is squarely in point is McCarty v. Harris, 113 So. 233 (Ala. 1927); specific performance was granted.

The District court erred in its decision to the effect that the subordination clause is incapable of specific performance because it refused to accept the testimony of experts as required by Hawaii law. In any event, its decision produces a rule wholly out of keeping with Hawaii jurisprudence--and, indeed, anomalous in the jurisprudence of the common law. The court should be reversed.

II. Waiver

Even if it should be found that the subordination clause this case cannot be specifically enforced the court below ould not have granted summary judgment. The proper remedy such a case is to grant defendant specific performance condioned upon defendant's waiving its right to benefits under the bordination clause.[9] In this case, of course, it was not cessary for the court to decree specific performance in a contional form for defendant offered in open court to waive its nefits under the subordination clause. The law is settled and ite clear that an indefinate provision or provisions in a conact otherwise suitable for specific enforcement may be waived the party entitled to the benefit thereunder and that that rty then becomes entitled to the specific enforcement of the lance of the contract. Some examples from the writers and eatises:

Restatement, Contracts §365

> The fact that a part of the promised performance cannot be rendered, or is otherwise such that its specific enforcement would violate some of the rules stated in §§360-380 does not prevent the specific enforcement of the remainder, if in all other respects the requisites for specific performance of that remainder exist....(among the rules in §§360-380 is that in §370 forbidding specific enforcement of terms which are undertain).

E.g., Hubbell v. Ward, 40 Wash. 2d 779, 246 P 2d 468 (1952)

49 Am.Jur. Specific Performance, §77

> Where the plaintiff is willing to perform all of his obligations under a contract, he may waive the failure of the defendant to perform portions of the contract, and obtain specific performance of the balance of the contract, provided the case is otherwise an appropriate one for such a decree.

Pomeroy's Specific Performance of Contracts §161(3rd Ed. 1926)

> If an agreement consists of two parts which are separable, so that one portion could be enforced by itself, it would be no objection to a specific execution of one such part that the other is too uncertain to admit of the same remedy.

Fry on Specific Performance of Contracts §361(note 1, p. 175)

> It will be no objection to decreeing specific performance of a part of a contract, that another part is uncertain. (See also id. at §§355, 966.)

There is a very large body of case law decreeing partial r conditional specific performance of contracts such as ours. erhaps the situation which arises most frequently is that in hich a vendor or lessor owns some interest but does not have s good title as he agreed to convey. In all such cases the courts ave granted specific performance at the insistence of the vendee r lessee, requiring conveyance of all the vendor has even though he flaw in his title may be such that he could not himself have btained specific performance.[10]

0/ 4 Pomeroy's Equity Jurisprudence §1405b (5th Ed. 1941)

r example, in Lee Wah Koon v. Maui Dry Goods and Grocery Company, d., 30 Haw. 313 (1928), the defendant was lessee of some 14 res of land which it had subleased to one Takemori. Defendant tered into an agreement with plaintiff whereby it was to assign plaintiff all its right, title and interest in the leased land well as the title and interest of Takemori. At the time for rformance Takemori was unwilling to release his interest and e defendant was unable to induce him to do so. Plaintiff ought an action for specific performance. Held: Defendant st convey all the interest which it owns and must pay compen- tion to the plaintiff, by way of reduction in the purchase, the value of Takemori's interest. (In this case the compen- tion ammounted to almost the entire purchase price.)[11/] These ses make it clear that if appellees were unable to perform their reement to make their fee simple interest available to the lessee r mortgage purposes because they did not own the fee simple, ssee could waive that defect and obtain specific performance the remainder of the agreement. There should be no difference outcome where the owners are able to perform, but need not do because of a lack of the requisite definiteness in the agree- nt.

/ For examples of this situation outside this jurisdiction, see e.g., Torelle v. Templeman, 94 Mont. 149, 21 P.2d 60 (1933); Eppstein v. Cuhn, 225 Ill. 115, 80 N.E. 80 (1906); Levine v. LaFayette Building Corp., 103 N.J.Eq. 121, 142 Atl. 441 (1928); 10 L.R.A. (N.S.) 117; Case Note, 23 Mich. L.R. 535 (1925).

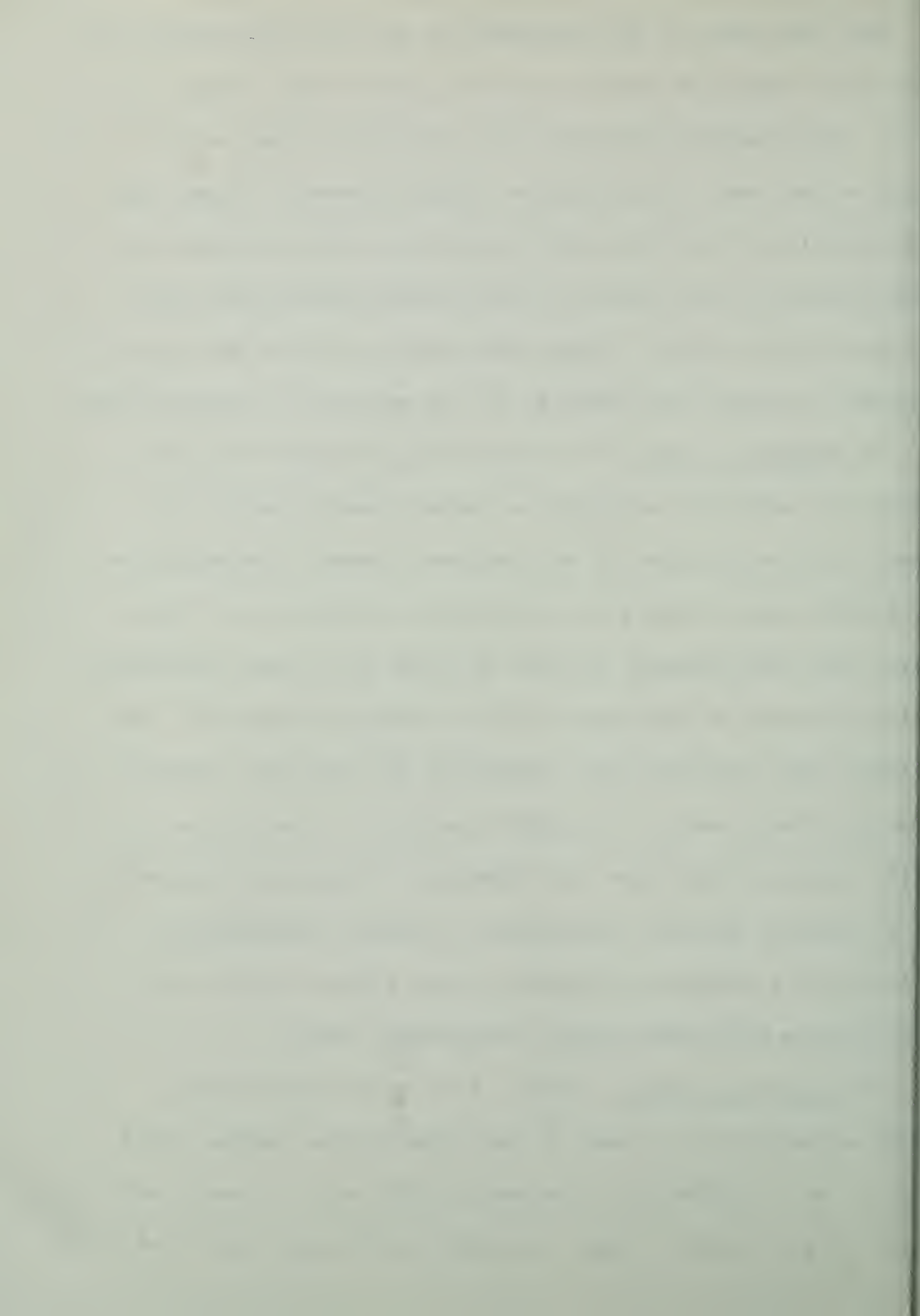
In any event, there is an almost equally large body of se law decreeing partial or conditional specific enforcement contracts in which one or more terms cannot be specifically forced because indefinite. These cases are entirely undistin- ishable from our own.

A provision which frequently seems to be indefinite is at providing for deferred payment of all or a part of the pur- ase price in options or contracts. Often such terms as rate interest, period of deferment, form or terms of security and en amount to be deferred are left unstated or are specifically ft for future agreement. These provisions are not specifically forceable at the behest of the optionee or buyer, but the urts enforce the options or contracts subject to waiver by the tionee or buyer of the right to defer. For example: In anton v. Williams, 209 Ga. 16, 70 S.E.2d 461 (1952), the parties tered into an agreement for the purchase of land with a house to built thereon. The payment terms recited in the agreement were at the total purchase price was to be $10,000, of which $4,000 s to be paid in cash with the balance to be obtained by purchaser obtaining a "G.I. Loan". If he could not obtain such a loan, e seller was himself to loan the balance to the purchaser. No te of maturity, interest rate, or amount of monthly payments s stated. The purchaser was unable to obtain a G.I. Loan. The ller's defense to a bill for specific performance was based in rt upon the indefiniteness of the loan provisions. The court

: "But the offer of the purchaser to pay cash is a waiver of provision which is for his benefit, and he has a right to e it. This waiver eliminates that portion of the contract ting to the loan, including the indefiniteness". There was apparently an indefiniteness concerning the specifications construction of the house and this indefiniteness was also ed upon by the seller. Again the court held that the buyers' ingness to accept the house as it was waived all indefiniteness.

In Hubbell v. Ward, 40 Wash2d 779, 246 P.2d 468 (1952), ntiff and defendant executed an earnest money receipt and ement for the purchase of an apartment house. Plaintiff was ay $9,000 upon evidence of merchantable title and to "sign ntract for the balance, payable at $200.00 or more per month, uding interest at the rate of 5% on deferred balances". The t found this provision too indefinite for specific enforce- because there was no "standard" contract in that state to n the parties could have had reference. The court granted a ee of partial specific performance, however, conditional plaintiff's tendering "payment of the balance of the full ract price of $29,000 within a reasonable time".

In Trotter v. Lewis, 185 Md. 528, 45 A2d 329 (1946), e was an option in a lease of land whereby the lessee could hase it at a "price not to exceed $2,500, with interest not xceed 6% per annum". Held: Specific performance will be



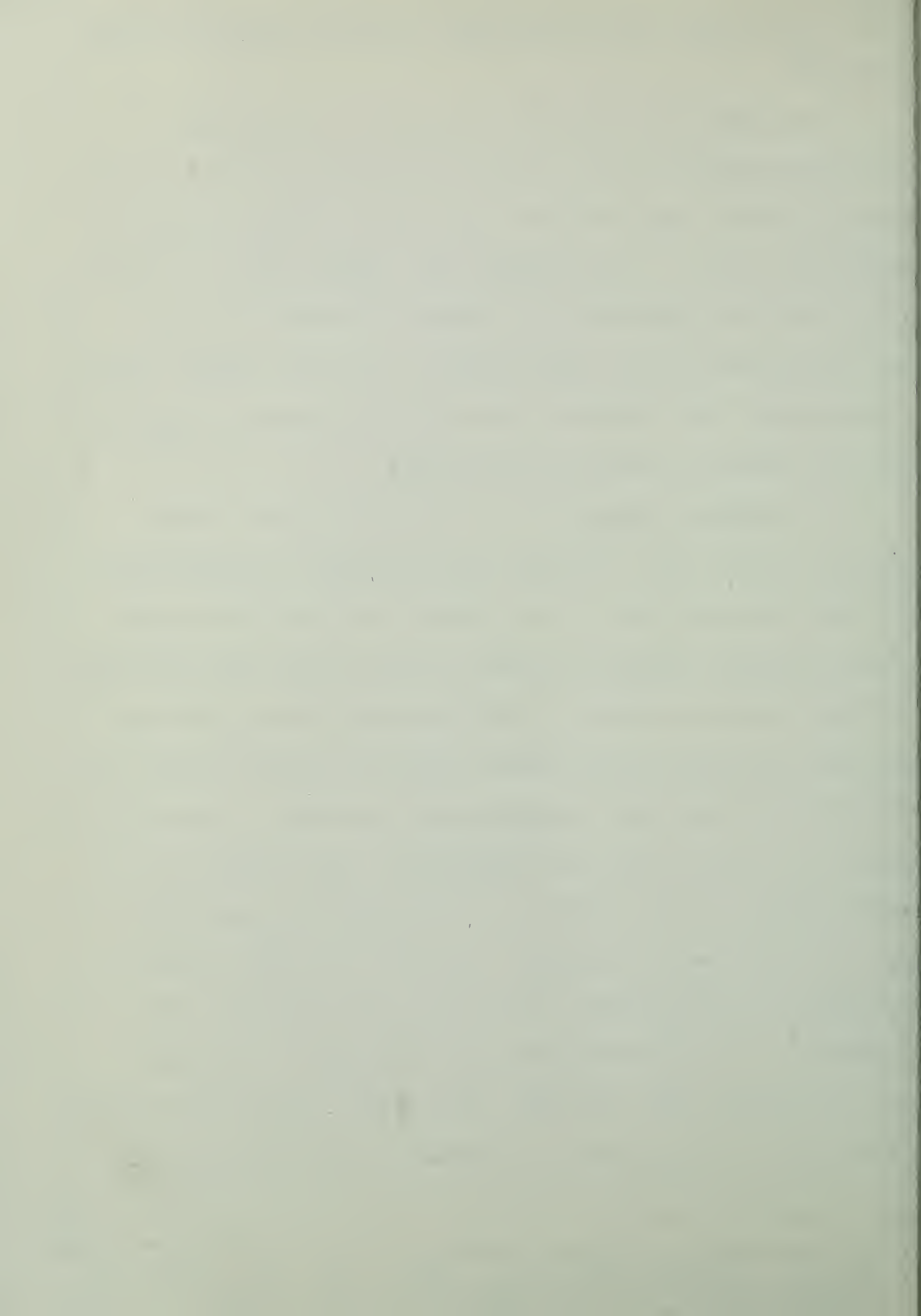
granted conditioned upon the purchaser tendering the full $2,500 in cash.[12/]

Of course, the principle of partial or conditional specific performance is not limited to indefinite provisions for deferred payment, any more than it is limited to cases involving insufficient title. As the Blanton case (supra) shows, it applies to any indefinite provision in a contract, provided, as always, that the provision is for the benefit of the party seeking specific performance. The following cases provide examples of application to a variety of indefinite provisions.

In Prilik v. Goodman, 111 N.Y.S. 2d 916 (S.Ct. 1952) plaintiff entered into a contract with defendant to purchase his drug store business; part of the contract was that defendant was to give plaintiff a five year lease on the premises upon which the drug store stood at a rental of $100 per month with an option to extend the lease for an additional 5 years at $110 per month. No details of the lease were included in the agreement. Plaintiff brought an action for specific performance. In a motion to dismiss brought by the defendant on the grounds of indefiniteness, the court denied the motion and said: "The main relief south herein is the specific performance of the agreement by defendant to sell plaintiff a drug store business. If, after trial, it develops that the court cannot grant specific performance of that part of the agreement to 'deliver' a lease to plaintiff,

---

12/ See also Morris v. Ballard, 56 App. D.C. 383, 16 F. 2d 175 (1926) Levine v. LaFayette Bldg. Corp., 103 N.J.Eq 121, 142 Atl. 441 (1928); Haire v. Patterson, 386 P2d 953 (Wash. 1963)



latter may elect to accept and the court may decree part
cific performance to the extent of the vendor's ability to
ply with the other terms of the agreement". (Id. at 918)

In Jasper v. Wilson, 14 N.Mex. 482, 94 Pac. 951 (1908),
vendee entered into an agreement with the agent of the owner
the property whereby the vendee was to purchase it and obtain
arranty deed. The owner defended on the ground that the
nt had no authority to grant a warranty deed. The vendee
willing to accept title without warranties. The court said:
is a well recognized principle of equity that a vendee, in
action brought by him for specific performance of a contract,
waive the performance on the part of the vendor of portions
his contract, and may elect to take a partial performance
he himself is willing to perform". Here, although the agent
have exceeded his powers, the plaintiff waived such excess
was entitled to a decree of specific performance.[13]

The authorities have been laid out in what was, perhaps,
essive detail. Nevertheless, they establish beyond doubt that
cific performance conditioned upon waiver of an unenforceable
vision is neither a novel nor an unusual procedure. Rather,
is a standard equitable remedy utilized throughout the common
jurisdictions. They further establish that ours is a classic

See also Wright v. Houdaille Hershey Corp., 321 Mich. 21,
31 N.W.2d 85 (1948); Neely v. Broadstreet National Bank of
Redbank, 16 FSupp. 839 (D.N.J. 1936).

ase for application of the remedy. We have a contract, valid, inding and fully enforceable in all its terms save one; that one s for the benefit only of the party seeking the court's aid. his is the same situation which prevailed in virtually every one f the cases cited and discussed above; they are indistinquishable rom this case and compel a conclusion that the plaintiff's motion r summary judgment should be denied. The District court ruled, wever, that the very existence of the subordination clause with- the option rendered the entire option tainted forever insofar specific enforceability is concerned. Nor could waiver by the fendant of its benefits under the subordination clause render e balance of the contract specifically enforceable, notwithstand- g that the balance was definite and appropriate for specific forcement. (Record pp. 105-06). In the court's own words:

> When one reads the entire paragraph in the "Option to Lease", supra, pertinent here, it does not appear with any certainty whatsoever that the subordination of the fee clause was intended and understood by the parties to be solely for the benefit of the lessee. The subordination clause was tightly entwined with "the standard provisions normally contained in" a Hawaiian lease and was clearly tied into the above "provisions" by the words which followed

the subordination clause, viz., "which provision (for subordination) is by way of example, but not by way of limitation."

That the subordination clause was so delineated, unequivocally indicates that it was intended to be an integral and highly essential provision of the lease -- as this court has previously ruled -- and manifestly thus was intended to be for the benefit of both parties -- not the vendee alone. The term of the lease was to be 56 1/2 years. If a building of x value were placed thereon, it might be completely depreciated by the time the lease expired, whereas if a building of y value were built thereon, it might still be of great value to the lessor at the termination of the lease. The difference between an x or y building might well be the difference between subordination and no subordination of the fee, and in that difference the plaintiff had an obvious interest and potential benefit.

Unless it can be said with certainty that the option, on its face, shows the subordination clause was intended solely to benefit the lessee, then an attempted unilateral waiver by the lessee of that

the subordination clause, viz., "which provision (for subordination) is by way of example, but not by way of limitation."

That the subordination clause was so delineated, unequivocally indicates that it was intended to be an integral and highly essential provision of the lease -- as this court has previously ruled -- and manifestly thus was intended to be for the benefit of both parties -- not the vendee alone. The term of the lease was to be 56 1/2 years. If a building of x value were placed thereon, it might be completely depreciated by the time the lease expired, whereas if a building of y value were built thereon, it might still be of great value to the lessor at the termination of the lease. The difference between an x or y building might well be the difference between subordination and no subordination of the fee, and in that difference the plaintiff had an obvious interest and potential benefit.

Unless it can be said with certainty that the option, on its face, shows the subordination clause was intended solely to benefit the lessee, then an attempted unilateral waiver by the lessee of that

which to the contrary, apparently was for the mutual benefit of both parties is deficient. A mutual right cannot be waived unilaterally. (Cite omitted) (Record pp. 117-118).[14/]

Somehow the court became confused between the apparent
ɪrtance of the clause as indicated by its location in the agree-
: and the question whose benefit it was for. There is no re-
.on between the two.[15/] This confusion is unfortunate for it
:lear, both from the language of the option and from the na-
: of subordination, that the clause provides no benefit what-
· to the owners. The language of the provision -- "The Lessor
.l subordinate their fee to permit the Lessee to obtain financing"
ɪlaces a duty only upon the Lessor; the Lessee is required to
ɪothing. There is no obligation, implied or otherwise,
ɪ the Lessee to utilize the funds obtained because

In the almost 75 pages of briefs and memoranda filed and the extensive oral argument presented in the District Court preceding this ruling, only an occasional passing reference was made to the claim that the subordination clause was for the benefit of appellees. Their attorney made no serious attempt to argue or present this theory and it was not mentioned by the court prior to issuance of the ruling quoted above.

For example, one can imagine a provision bargained for and obtained by the Lessee permitting him to cancel the lease on 30 days notice. Such a provision might be of the utmost importance insofar as the Lessee is concerned, but the fact that it is important does not in any way make it beneficial to the Lessor. The same is true, of course, of many other more common provisions such as an option to extend the lease or to purchase the fee simple title at a given price or a provision calling for the rent to go up (or down) to a certain figure at a given time.

ich it must repay) investing the same uneconomically and un-
fitably in prolonging the life of the improvements beyond the
e when they will benefit him. Surely, this kind of possible -
-unlikely, indirect, potential advantage does not transform
subordination clause into something designed for the benefit
the Lessor. 16/ In many of the cases previously cited, the
ties had stipulated that payment of a purchase price was to be
e over a period of time at a given rate of interest.17/ It is
more plausible that the sellers in those cases would have re-
ved some benefit from deferred payment (either because of their
situation or because the interest to be received was more than
y could earn otherwise) than that the Lessors in this case will
r receive any benefit from subordination. Yet, in each of those
es, the court permitted specific performance on the basis of
buyer's willingness to pay all cash. These cases thus estab-
n that the right to waive is not limited to provisions which
ld never, under any stretch of the imagination, be beneficial
the other party; rather waiver is proper of provisions where
direct, bargained-for benefit accrues to the waiving party.

Indeed, one wonders why, if the clause is beneficial to these Lessors, they have refused to perform under it.

E.g., Blanton vs. Williams, 209 Ga.16, 70 S.E.2d 461 (1952); Hubbell v. Ward, 40 Wash.2d 779, 246 P.2d 468 (1952); and Trotter v. Lewis, 185 Md. 528, 45A.2d 329 (1946).

The rationale underlying all the waiver cases previously

ed is not only the general policy of the common law that contracts

ht to be enforced where possible in order to effectuate the in-

tions of the parties;[18] There is also a strong feeling that

is unfair to permit a party to a contract who has avoided one

his obligations thereunder because of some defect to assert

own avoidance as an excuse for avoiding the balance of his

igations as well.[19] To permit this would be to permit a

iberate avoidance of the general policy in favor of contract

orcement, and it would constitute a turning away by courts of

ity from their traditional reliance upon substance and actual

ent toward a mechanical jurisprudence based upon technicality

form.[20] For these reasons, it has not been permitted.[21]

The appellees are in a somewhat awkward position in this

e for they first assert their unwillingness to perform a given

y under the lease and, then, must convince the court that this

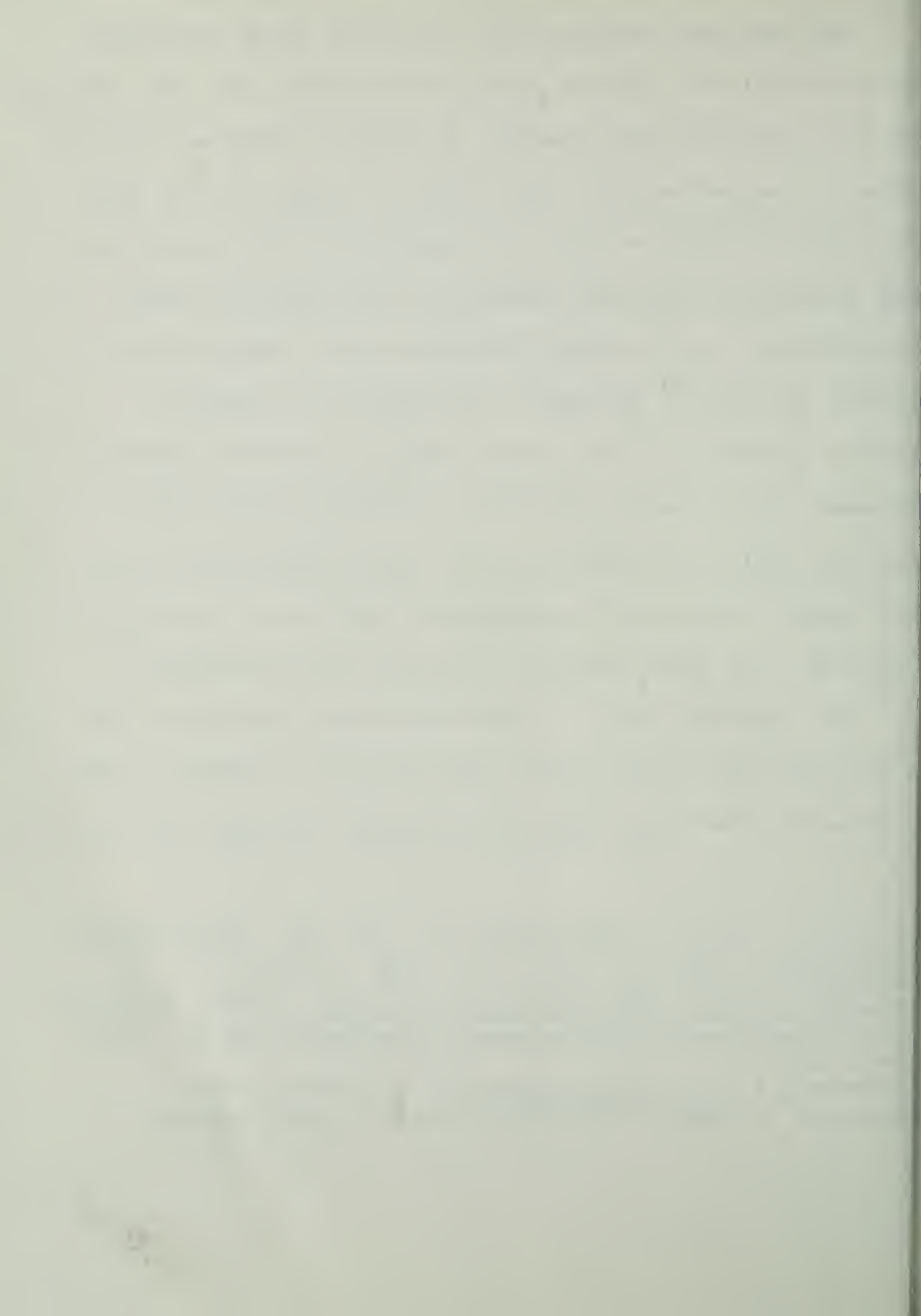
---

See e.g., 17 Am.Jur.2d, Contracts §§75, 244, 254. F.S. Royster Guano Co. v. Hall, 68 Fed. 2d 533 (C.A.4 1934).

See Morris v. Ballard, 56 App.D.C. 383, 16 Fed. 2d 175 (1926); Pomeroy's Specific Performance of Contracts (3d Ed. 1926) Sec. 155; Fry on Specific Performance of Contracts (3d Ed. 1884) Sec. 830.

4 Pomeroy's Equity Jurisprudence §378 (5th Ed. 1941).

See note 19, supra; discussion of waiver cases, passim.



was really for their benefit. If appellees wish, the appel-
will be happy to alter its offer to waive the subordination
sion by offering to waive only so much thereof as appellees
e; the appellees may then subordinate their fee simple inter-
s much as they wish.

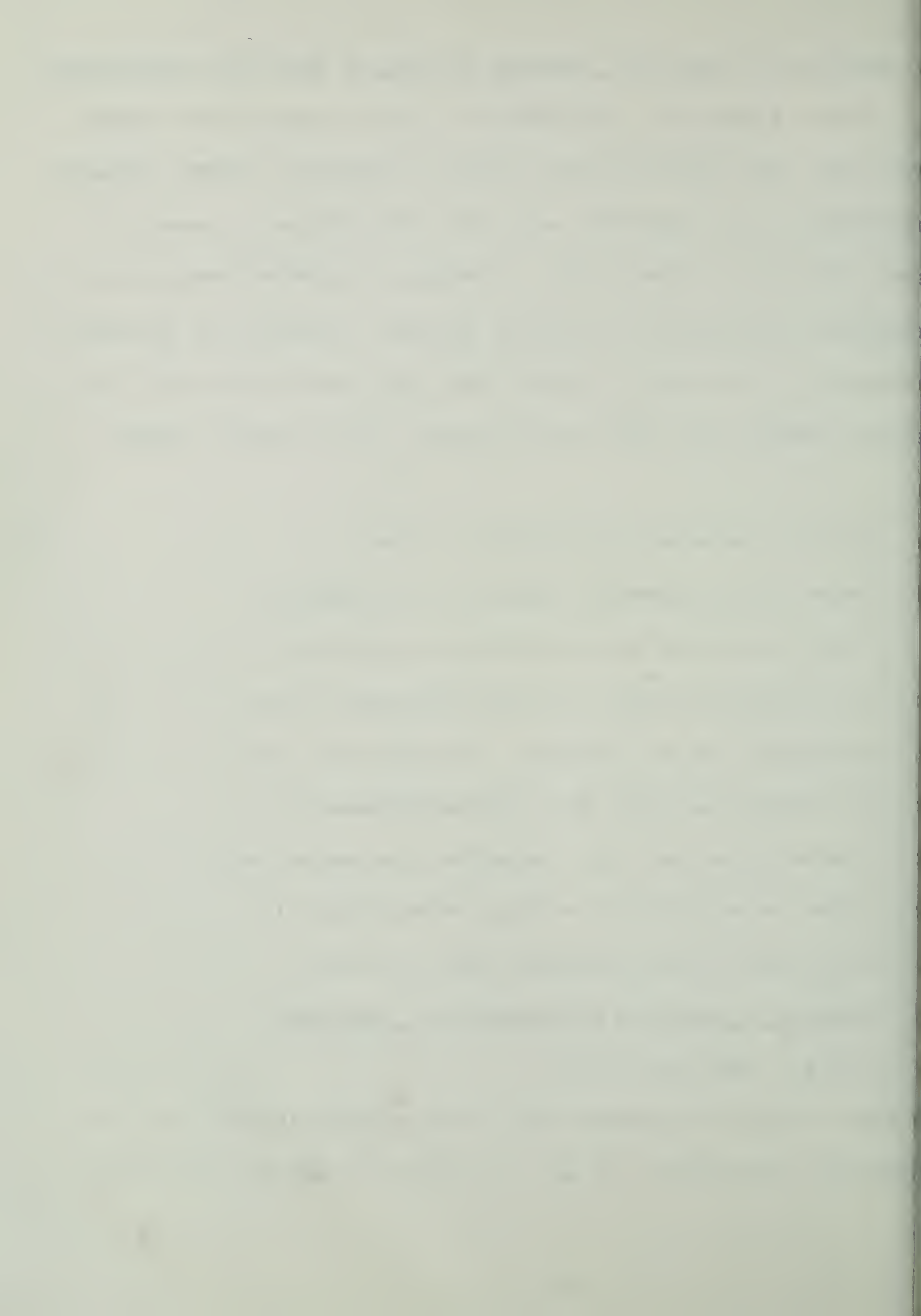
The District Court was in error in refusing to accept
lant's offer to waive its benefits under the subordination
e and should be reversed on this ground.

Appellant's Claim for Damages in Lieu of Specific Performance:

Even if specific performance is not an appropriate remedy
is case, the District Court erred in granting summary judgment
ppellees since appellant was still entitled to an award of
es. The law is clear that a finding of indefiniteness or un-
eteness sufficient to render a contract incapable of specific
rmance, is not also a finding that the complaining party can-
btain damages for the breach thereof. For example, Pomery

> greater certainty is required in the terms of an agreement which is to be specifically executed in equity than is necessary in a contract which is to be the basis of an action at law for damages. An action at law is founded upon the mere non-performance of the defendant and this negative conclusion can often be established without determining all the terms of the agreement with exactness.
> Pomeroy's Specific Performance of Contracts, (3d Ed. 1884) Sec. 361.

even though an agreement may be too indefinite in its terms
pecific enforcement, it may be certain enough to constitute



lid contract for breach of which damages may be recovered.

The requirements of definiteness which must be met by a ract in order to maintain an action for damages for the ch thereof are stated in 17 Am. Jur., Contracts, §§75-85. e are that it must be sufficiently definite in its essential s as to time for performance, subject matter and quantity and e or consideration to allow a court to determine whether its s have been breached. In this case a clear and definite of- to lease designated property for a definite period at a set e was made by the appellees and unequivocally accepted by llant.

Only one term has been deemed indefinite, and that term ntirely unnecessary to a determination of whether there has performance by the appellee or to a determination of the nt of damages suffered by appellant. To some extent it t be argued that the clause would at least be helpful in rmining the amount of damages, since appellant's lease would been more valuable with an unrestricted subordination agree- in it than without, and its damages would therefore have greater. Appellant, however, will waive performance under subordination clause by appellee and thus eliminate any pos- lity of difficulty with respect to damage computation. 22/

---

17 Am. Jur. 2d, Contracts, §390

If the District Court found that the contract in this case
:oo indefinite to sustain a damage action, it was clearly
rror. Appellant in its counterclaim alleged all necessary
nts to an action in damages which raised substantial issues
ct between the parties, and the summary judgment was, there-
improperly granted.

IV. Lis Pendens:

In its final order, the District Court erroneously ancelled the lis pendens recorded by the appellant in the Bureau f Conveyances in the State of Hawaii on October 25, 1963. The iling of lis pendens in Hawaii is governed by statute, the pplicable provision of which is as follows: "In any action, hether at law or in equity, affecting the title or the right f possession of real property, the plaintiff, complainant or etitioner at the time of filing the complaint or petition or ill in equity, and the defendant or respondent, at the time of iling his answer, when affirmative relief is claimed in such nswer, shall record in the Bureau of Conveyances a notice of the endency of the action, containing the names of the parties and he object of the action or defense, and a description of the roperty affected thereby. From and after the time of filing uch notice for record, a purchaser or incumbrancer of the property ffected shall be deemed to have constructive notice of the pen- ency of such action, and of its pendency against parties desig- ated by their real names."[23]

Appellant, upon removal of this case to the Federal ourt and upon filing its answer hereunder, recorded a lis pendens erving notice of the pendency of this suit as authorized by sta- ute. A lis pendens does not expire upon issuance of a judgment,

---

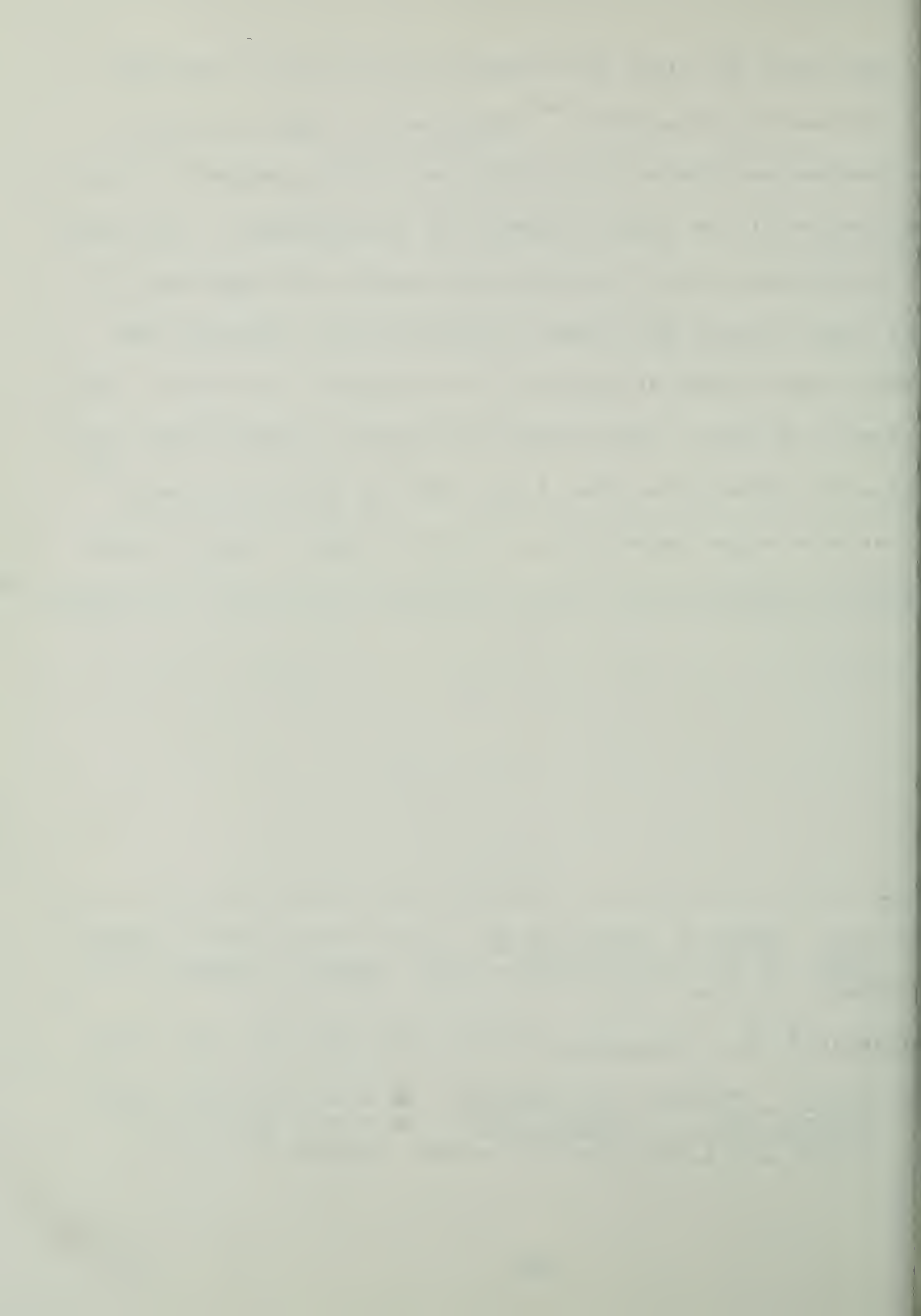
3/ Revised Laws of Hawaii (1955) Sec. 230-42

: only upon the final determination of the case, including
e outcome of any appeals.[24] Appellant's right to record a
s pendens and thereby obtain the protection granted it by the
gislature of the State of Hawaii is unconditional. The effect
the District Court's action is to deprive the Appellant of
is right without any reason or justification therefor and
thout any finding of fact or law to support its action. This
error, if for no other reason than that a Federal Court must
llow the substantive law of the State in diversity cases.[25]
was also error because, as a matter of law, a court, absent
atutory authorization, has no authority to cancel a lis pendens.[26]

/ E.g., Wilkin v. Shell Oil Co., 197 F.2d 42 (1952); Maedel v. Wies, 15 N.W. 2d 692 (Mich. 1944); Kremer v. Schutz, 107 Pac. 780 (Kan. 1910).

/ Erie R. R. v. Tompkins, 304 U.S. 64, 82 L. Ed. 188 (1938)

/ Moran v. Midland Farms Company, 282 S.W. 608 (Tex. 1926); Marpret Corp. v. Hargust Corp., 210 N.Y.S. 465 (1925); Corpus Juris Secundum, Lis pendens Section 37.

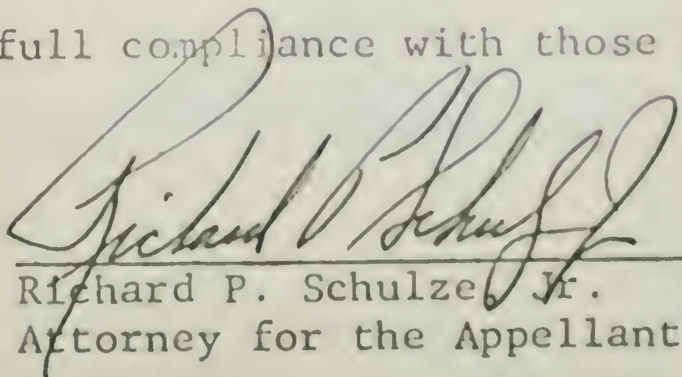


CONCLUSION

For the reasons previously stated, the District Court rred in its conclusion that the subordination clause was too ndefinite for specific enforcement and further erred in its nclusion that Defendants offered to waive its benefits under at clause, was invalid and did not correct any indefiniteness ich might exist therein. This court should reverse the District urt's grant of summary judgment to Appellees and remand, with structions to set the matter for trial. In the alternative, is court should find that the District Court erred in granting pellee's motion for summary judgment as against Appellant's ayer for pecuniary damages.

In addition, this court should rule that the purrted cancellation of Defendant's lis pendens by the District urt was error and should reverse the District Court in this spect.

I certify that, in connection with the preparation of is brief, I have examined Rules 18 and 19 of the United States urt of Appeals for the Ninth Circuit, and that, in my opinion, e foregoing brief is in full compliance with those rules.



Richard P. Schulze, Jr.
Attorney for the Appellant

UNITED STATES COURT OF APPEALS

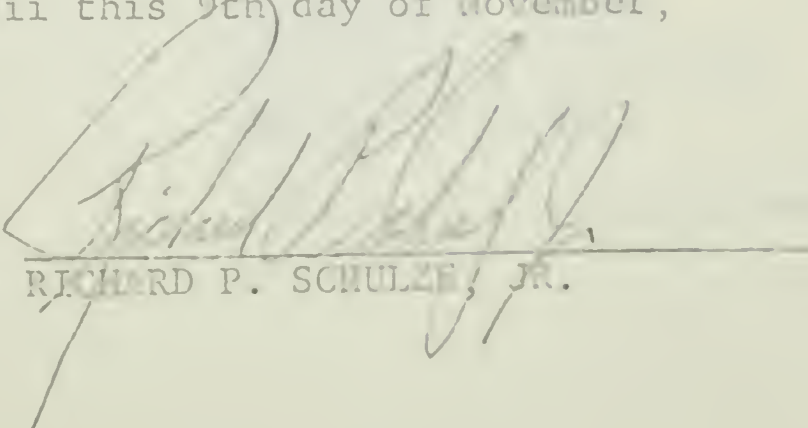
FOR THE NINTH CIRCUIT

HE LAHAINA-MAUI CORPORATION, California corporation, Appellant,	)	NO. 20419
-vs-	)	
OSEPH TAU TET HEW and HELEN KIONA HEW, husband and wife, EORGE TAN and SHIZUKO RUTH TAN, usband and wife, Appellees.	)	

CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of November, 1965, caused to be mailed (First Class Mail) in the U. S. Post ffice at Honolulu, Hawaii, postage thereon fully prepaid, nree copies of the foregoing brief of the above named Appellant, HE LAHAINA-MAUI CORPORATION, addressed to Mr. William M. Swope, nith, Wild, Beebe & Cades, First National Bank Building, onolulu, Hawaii.

DATED at Honolulu, Hawaii this 9th day of November, 965.



RICHARD P. SCHULZE, JR.